FILED
FEB 17
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH MILLS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT

J. JOSEPH CURRAN, JR.,
Attorney General of Maryland,

CHARLES O. MONK, II,
Deputy Attorney General,

GARY E. BAIR,
Assistant Attorney General,

RICHARD B. ROSENBLATT,*
Assistant Attorney General,

The Munsey Building,
7 N. Calvert Street,
Baltimore, Maryland 21202,
(301) 576-6410,

Counsel for Respondent.

*Counsel of Record

The Daily Record Co., Baltimore, MD 21202

ISSUES PRESENTED

1. Whether the Maryland capital punishment statute as interpreted by the Maryland Court of Appeals permits full consideration of evidence presented in mitigation of sentence?

2. Whether the jury instructions in the instant case provided proper guidance for the consideration of the evidence presented in mitigation?

3. Whether the introduction at sentencing of evidence describing the background of the murder victim was consistent with the Eighth and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

Page

Issues Presented. i

Statement of the Case 1

Summary of Argument 6

Argument:

I. The Maryland capital punishment statute as interpreted by the Maryland Court of Appeals permits full consideration of evidence presented in mitigation of sentence. 8

II. The jury instructions in Petitioner's case provided proper guidance for the consideration of the evidence presented in mitigation 23

III. The introduction at sentencing of evidence describing the background of the murder victim was consistent with the Eighth and Fourteenth Amendments to the United States Constitution. 31

Conclusion 39

TABLE OF CITATIONS

Cases

Andres v. United States,
333 U.S. 740 (1948) 26

Apodaca v. Oregon,
406 U.S. 404 (1972) 22

Booth v. Maryland,
107 S.Ct. 2529 (1987) ..... 8, passim

Eddings v. Oklahoma,
455 U.S. 104 (1982) ..... 17, passim

Gardner v. Florida,
430 U.S. 349 (1977) 33

Garner v. Louisiana,
368 U.S. 157 (1961) 21, 22

Henderson v. Kibbe,
431 U.S. 145 (1977) 24

Hitchcock v. Dugger,
107 S.Ct. 1821 (1987) 18, 34

Jurek v. Texas,
428 U.S. 262 (1976) 20

Lockett v. Ohio,
438 U.S. 586 (1978) ..... 9, passim

Lowenfield v. Phelps,
56 U.S.L.W. 4071
(U.S. Jan. 13, 1988) 28

Mills v. State, 310 Md. 33,
527 A.2d 3 (1987) ..... 23, passim

Mullaney v. Wilbur,
421 U.S. 684 (1975) 22

Roberts v. Louisiana,
428 U.S. 325 (1976) 8, 15, 16

Skipper v. South Carolina,
106 S.Ct. 1669 (1986) 18, 34

State v. Bell, 360 S.E.2d 706
(S.C. 1987) 36

State v. Kirkley, 308 N.C. 196,
302 S.E.2d 144 (1983) 20

Sumner v. Shuman,
107 S.Ct. 2716 (1987) 16

United States v. Perez,
22 U.S. (9 Wheat.) 579 (1824) 22

Woodson v. North Carolina,
428 U.S. 280 (1976) 8, 15, 16

Constitutional Provisions

United States Constitution:

Eighth Amendment 10, 31

Fourteenth Amendment 31

Statutes

Annotated Code of Maryland:

Article 27, §412 11

Article 27, §413 ..... 10, passim

Rules

Maryland Rule of Procedure,
Rule 4-343 ..... 12, 15, 29

No. 87-5367

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RALPH MILLS,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Petitioner, Ralph Mills, was tried by a jury in the Circuit Court for Allegany County, Maryland, and convicted of first degree premeditated murder. The same jury sentenced Petitioner to death in a separate, subsequent proceeding. The Court of Appeals of

Maryland affirmed Petitioner's conviction and sentence. By order of December 7, 1987, this Court issued a writ of certiorari.

Evidence produced at trial showed that Petitioner shared a cell in the Maryland Correctional Institution in Hagerstown, Maryland, with Paul Robin Brown. Officers were called to the cell to investigate a disturbance and discovered Petitioner demanding to be released from the cell saying, "My cell buddy is dead." The cell door was opened and Petitioner emerged, carrying a blood covered shank at his side. Brown's body was found lying on his bunk, stabbed six times in the chest and 39 times in the back. Written on the wall of the cell in what appeared to be blood were the words, "Helter Skelter's son."

At the sentencing proceeding that followed Petitioner's conviction for premeditated murder in the first degree, the State introduced into evidence a pre-sentence investigation done for the case and a "victim impact statement." The victim impact statement

summarized the life history of the deceased. Defense counsel stated that he had no objection to the admission of either document (J.A. 14-15). The State also introduced Petitioner's prison records and testimony from the Division of Parole and Probation agent who had conducted interviews of Petitioner and his parents.

On Petitioner's behalf, his mother testified that he had a sixth grade education and began having problems at a young age (J.A. 45). His mother's first contact with a state agency concerning his behavior occurred when Petitioner was approximately 11 or 12 years old (J.A. 46). His conduct required his mother to go to his school every day (J.A. 46). He underwent therapy for several months (J.A. 47). At that time, he was diagnosed as having minimal brain damage and was placed on medication (J.A. 48).

Petitioner was ultimately placed in the German Children's Home (J.A. 49). His misbehavior commenced anew as a combined result of being taken

off the medication and having a lack of strict supervision. (J.A. 50-51). Petitioner stayed at the German Children's Home for approximately nine months with negative results (J.A. 51). However, his mother refused to take him home because she was afraid of what might happen (J.A. 52).

In May of 1980, Petitioner was placed in the Maryland Training School for Boys (J.A. 53). He ran away from the Training School (J.A. 54). He was heavily involved with drugs (J.A. 52, 54). Petitioner was discharged from the Training School over the objection of his mother (J.A. 57). According to his mother, going to court and being involved in the law was "a continuing thing" (J.A. 57).

Petitioner's parents were divorced when he was six or seven (J.A. 45). He had little contact with his natural father because most of the time "his father was either incarcerated or running as a fugitive from the law." (J.A. 55). Petitioner never accepted his stepfather as a father (Id.). With respect to Petitioner's intellectual ability, his mother stated that he "believes he's very smart, but . . . [he's] slow." (J.A. 55).

Petitioner elected not to testify and no further evidence was produced by the defense (J.A. 68). Following instructions to the jury, Petitioner was informed of his right to speak to the jury, unsworn; he declined that opportunity (J.A. 75).

The State then presented its closing argument, and argument on behalf of Petitioner followed. Defense counsel argued that Petitioner had a low I.Q. and a sixth grade education. He argued that Petitioner needed to be treated, not killed. With specific reference to the mitigating circumstances, counsel argued that the jury should find the explicit mitigating circumstances of "youth" (J.A. 90-91) and lack of "future dangerousness" (J.A. 91-92). Under the "other" mitigating circumstances, he urged the jury to find that the State failed to reform Petitioner despite the numerous opportunities to do so (J.A. 92-93).

Following deliberation, the jury found the existence of an aggravating circumstance (the defendant committed the murder at a time when he was confined in a correctional institution), but found no mitigating circumstance. A sentence of death was imposed.

SUMMARY OF ARGUMENT

I.

The Maryland capital punishment statute permits full consideration of evidence offered in mitigation at a capital sentencing proceeding. Requiring a jury to make determinations as a single entity, rather than as twelve individual sentencers, is not an unconstitutional restriction on the consideration of mitigating evidence. Indeed, it is no restriction at all, for Maryland's statute requires unanimity to reject, as well as accept, any mitigating circumstance. Anything short of unanimity results in a hung jury and, under the statute, a life sentence is then imposed.

II.

The instructions to the jury and the language of the verdict form clearly conveyed the need to make any determination unanimously. Therefore, the jury deliberated with a proper understanding of the law.

In this case, the Maryland Court of Appeals announced for future guidance an additional procedure to permit consideration of mitigating circumstances absent unanimity that was not included in these jury instructions. However, because this jury unanimously rejected all mitigating circumstances, the absence of an instruction on this additional procedure is of no consequence. Moreover, because the additional procedure serves only to resolve deadlock, it benefits the prosecution, not the defense, since the result of deadlock is a life sentence.

III.

The third issue presented requires this Court to reconsider its opinion issued last term in Booth v. Maryland, 107 S.Ct. 2529 (1987). The written summary of the victim's background introduced into evidence without objection was not inadmissible victim impact evidence. The summary contained no reference to the impact of the murder on family members. It merely humanized the victim without injecting arbitrariness or caprice into the sentencing proceeding.

ARGUMENT

I.

THE MARYLAND CAPITAL PUNISHMENT STATUTE AS INTERPRETED BY THE MARYLAND COURT OF APPEALS PERMITS FULL CONSIDERATION OF EVIDENCE PRESENTED IN MITIGATION OF SENTENCE.

Throughout the State proceedings, Petitioner contended that the Maryland capital punishment statute was unconstitutional under Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), inasmuch as the statute

"mandated" a death sentence in any case where a sentencing jury could not unanimously agree on the existence of at least one mitigating circumstance. Additionally, Petitioner contended that the Maryland capital punishment scheme precluded the consideration of mitigating evidence in contravention of Lockett v. Ohio, 438 U.S. 586 (1978), because it required unanimity on the existence of each separate mitigating factor.

In considering Petitioner's contentions, the Maryland Court of Appeals did not repudiate Petitioner's interpretation of the decisions of this Court. Rather, the Court of Appeals held that Petitioner's interpretation of the operation of the Maryland statute was flawed and, as a result, the foundation for his argument was destroyed. The Maryland high court proceeded to articulate the mode for the consideration of mitigating factors and, under that construction, rejected Petitioner's contentions. There is no basis for this Court either to encroach upon the State court's

interpretation of the State law or to find that interpretation unconstitutional.[1]

A. The Maryland Capital Punishment Statute.

To avoid the arbitrary and capricious imposition of a death sentence in violation of the Eighth Amendment to the United States Constitution, the Maryland Capital Punishment Statute, Md.Ann. Code art. 27, §413 (1957, 1982 Repl.Vol.), responded to this Court's demand for guided discretion by requiring multiple findings to be made by a sentencer (either judge or jury, at the defendant's election) before a death sentence may be imposed. The sentence may be imposed only upon conviction of first degree murder.

---

[1] Petitioner apparently does not challenge the constitutionality of the Maryland Court of Appeals' interpretation of the law. Instead, he complains that he did not receive the benefit of that interpretation. Petitioner misperceives the court's holding as a new limitation on the operation of the statute. Because of this misperception, the State has set forth the applicable interpretation of the capital punishment law and explained its facial constitutionality. Petitioner's argument concerning the inadequacy of the jury instructions is addressed in Argument II, infra.

Art. 27, §412(b). Additionally, the State must demonstrate beyond a reasonable doubt that the defendant either was the principal in the first degree to the murder or had contracted for its perpetration. Art. 27, §413(e)(1). It is then incumbent upon the State to prove beyond a reasonable doubt the existence of one or more statutorily delineated threshold conditions, i.e., "aggravating circumstances," before the sentencer considers the question of life or death. Art. 27, §413(d). Unless the State demonstrates that the defendant either was a principal in the first degree or that he contracted for the perpetration of the murder, and that an aggravating circumstance exists, the process is aborted and a sentence of life imposed.[2]

Once the sentencer finds that the State has met its initial burdens, the sentencer proceeds to consider

---

[2] For offenses occurring after July 1, 1987, the sentencer must further determine whether the sentence should be life or life without the possibility of parole where the State has filed notice seeking the latter sentence. Md.Ann.Code art. 27, §412 (1957, 1987 Repl.Vol.).

whether the evidence demonstrates by a preponderance the existence of any mitigating circumstances. Art. 27, §413(g). If any mitigating circumstances are found, they are to be weighed against the aggravating circumstances to determine the appropriate sentence. If none is found, no weighing process is conducted — the sentence is death.

Seven mitigating circumstances are specifically enumerated for the sentencer's consideration.[3] Number eight permits the sentencer to articulate any other factor relevant to the crime or to the defendant that it finds militates against a sentence of death. Art. 27, §413(g). Pursuant to Maryland Rule 4-343, a prepared verdict sheet is completed by the sentencer

---

[3] The seven legislatively articulated mitigating circumstances may be summarized as: (1) lack of a prior record for violent crimes; (2) participation of the victim in the crime; (3) murder committed under duress, domination, or provocation; (4) impaired capacity of the defendant; (5) youthful age of the defendant; (6) defendant's act not the sole proximate cause of death; and (7) defendant would not constitute a continuing threat to society.

in each case, setting forth the aggravating factors and the mitigating factors relied upon in determining the appropriate sentence. There is a blank for "Yes" and a blank for "No" alongside each of the eight mitigating circumstances listed.

To find the existence of any mitigating factor, a sentencing jury must be unanimous. The sentencing jury also must be unanimous to reject any mitigating factor. If, after a reasonable time, the jury cannot unanimously agree on the existence or non-existence of a mitigating circumstance, the jury is declared deadlocked and excused. Art. 27, §413(k)(2).[4] The result of a deadlocked jury is the mandatory imposition of a life sentence. Id.[5]

---

[4] This deadlock provision also is applicable to the ultimate balancing determination in which the question of life or death is decided.

[5] See footnote 2, supra.

B. The Maryland Court of Appeals' interpretation of the statutory scheme is constitutional.

Petitioner based his assertion of unconstitutionality in the state court on his own interpretation of how a jury would consider mitigating circumstances. Under his interpretation of the statute, a jury would mark "Yes" for those mitigating circumstances unanimously found to exist and would mark "No" any time there was a lack of unanimity with respect to "Yes." Petitioner postulated before the Maryland Court of Appeals a situation where 11 jurors could have favored a mitigating factor but, because of a single holdout, "No" would have to be marked. The import, Petitioner contended, was that, because of the single holdout, a death sentence was mandated by the absence of a finding of any mitigating circumstance.

The Court of Appeals corrected Petitioner's misinterpretation of the statute, noting that just as "Yes" would be appropriate only where a sentencing jury unanimously agreed upon the existence of the mitigating circumstance, to mark "No" similarly

required unanimity. The single holdout would not result in a mark of "No" for all mitigating circumstances, because there would be no unanimous "No" vote. Instead, the jury would simply be unable to agree.[6] Rather than a death sentence being imposed by operation of law under Maryland Rule 4-343(e) (verdict sheet, "Determination of Sentence" section, subsection 3), a sentence of life would be imposed by operation of law pursuant to Article 27, §413(k)(2) (where jury not able to agree unanimously within reasonable time, court shall dismiss jury and impose sentence of imprisonment for life).

Given this construction, Woodson v. North Carolina and Roberts v. Louisiana are inapposite. The

---

[6] As required by the Maryland Code, Art. 27, §413(b), this sentencing proceeding was conducted before the jury that determined the defendant's guilt. A jury deliberating guilt/innocence is aware that a lack of unanimity on "Guilty" does not automatically result in a finding of "Not Guilty." Rather, "Not Guilty" requires an independent unanimous determination. This jury was simply required to apply that concept again.

sentence imposed in this case was not based solely on the crime without regard to the individual character of the defendant. The sentencer possessed the means to consider anything about the defendant when imposing sentence. To unanimously reject the evidence in mitigation, the evidence had to be considered. The Maryland statute, which permits the consideration of any other factor relevant to the crime or the defendant that militates against a sentence of death, is totally distinguishable from the statutes found unconstitutional in Woodson and Roberts. Cf. Sumner v. Shuman, 107 S.Ct. 2716 (1987) (statute mandating death sentence where murder committed by inmate serving life without parole held unconstitutional). There is no constitutional infirmity.

As a corollary to the proscription on mandatory sentences and the recognition of the need for individualized sentences in capital cases, this Court ruled in Lockett v. Ohio that there can be no limitation on the introduction of evidence offered in

mitigation of sentence. 438 U.S. at 604. In reliance on Lockett, Petitioner argued that the unanimity requirement, as it related to the finding that a mitigating factor existed, served to preclude consideration of mitigating evidence. Initially, a unanimity requirement does not preclude the consideration of any mitigating evidence and therefore is not the type of restriction proscribed by Lockett.

Lockett concerned a statute that permitted consideration of mitigating evidence only as it related to (1) the victim's involvement in the crime, (2) the duress or coercion under which the defendant committed the crime, and (3) the diminished capacity of the defendant. A similar limitation was addressed by this Court in Eddings v. Oklahoma, 455 U.S. 104 (1982), where a sentencing judge articulated that he could not by law consider evidence relating to the background of the offender. This Court equated this erroneous interpretation of the law with the statutory limitation in Lockett, and held that the judge had improperly

restricted his considerations underlying the imposition of sentence. 455 U.S. at 113.

Later, in Skipper v. South Carolina, 106 S.Ct. 1669 (1986), a ruling that precluded the introduction of evidence from the defendant's wife and correctional officers concerning the defendant's conduct in prison was also found to constitute an improper restriction on the ability to impose an individualized sentence. Again, last term, in Hitchcock v. Dugger, 107 S.Ct. 1821, 1824 (1987), "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, and . . . the proceedings therefore did not comport with the requirements of Skipper . . ., Eddings . . ., and Lockett."

There is no such restriction precluding the consideration of mitigating evidence in the Maryland statutory scheme. The Maryland statute permits the jury to find and weigh as a mitigating circumstance "any other facts which the jury or the court

specifically sets forth in writing that it finds as mitigating circumstances in the case." Article 27, §413(g)(8). There is absolutely no restriction on what the defendant may put forth by way of evidence.

Nor is there any improper restriction on the consideration of this evidence. Under the interpretation of the statute proffered by Petitioner, an unconstitutional restriction existed in that unanimity on a particular mitigating circumstance was required before it could be weighed in determining the appropriate sentence. However, Lockett and Eddings relate to restrictions on "input," not the subsequent deliberative process. Although a jury has twelve component parts, it is a single entity. The rejection of a mitigating circumstance, after introduction and full consideration of the evidence, is simply a factual determination. There is no legal impediment to the consideration of the evidence.[7] The requirement of

---

[7] Under Petitioner's definition of an unconstitutional restriction, even a majority requirement would work a (Continued)

jury unanimity is simply not the type of restriction found unconstitutional in Lockett and Eddings. See State v. Kirkley, 308 N.C. 196, 302 S.E.2d 144, 157 (1983).[8]

Most importantly, because the Maryland scheme requires unanimity to reject a mitigating circumstance, any particular legislative mitigating circumstance will escape consideration only after its existence is unanimously rejected by the sentencing jury. An "other" mitigating circumstance will be

---

restriction on the consideration by the minority. Petitioner views a jury as twelve independent sentencers operating free of the views of the others. Such a view is completely contrary to any notion of guided discretion.

[8] The focus on restrictions to "input" rather than on deliberation is evident from the application of Lockett to the statute in Jurek v. Texas, 428 U.S. 262 (1976). Lockett v. Ohio, 438 U.S. at 606-07. The Texas statute passed muster because the state courts interpreted "future dangerousness" to permit the introduction of limitless evidence that could reflect on this finding. Some of this evidence would mitigate against a death sentence, but might not be considered in the ultimate determination if the jury deemed it irrelevant to the question of "future dangerousness." Yet, no improper restriction was cited.

rejected only after the jury considers the evidence and unanimously concurs that it supports no such "other" mitigating circumstance. Any juror who is convinced that a mitigating factor has been demonstrated by a mere preponderance of the evidence cannot be forced to surrender that view and impose a sentence of death simply by being outvoted. His determination to retain his view will result in a deadlocked jury and a life sentence.

The existence or non-existence of any particular mitigating circumstance is a question of fact for the sentencer. After consideration, the sentencing jury may choose to reject the evidence offered in mitigation as being without mitigating value. However, there is no legal restriction on the consideration of mitigating evidence that would render the statutory scheme unconstitutional.

C. The state court's interpretation of the Maryland statute is entitled to deference.

It is beyond question that a state court has the sole power to interpret its statutes. Garner v.

Louisiana, 368 U.S. 157, 169 (1961). Only on rare occasions, where a state court interpretation of state law appears to be "an obvious subterfuge to evade consideration of a federal issue," will the state interpretation be reexamined by this Court. Mullaney v. Wilbur, 421 U.S. 684, 691 n.11 (1975).

The interpretation in this case was clearly not an "obvious subterfuge." Historically, all determinations by a jury have been required to be unanimous. See Apodaca v. Oregon, 406 U.S. 404, 407-08, nn. 2 & 3 (1972). If all twelve jurors are not convinced of guilt in a trial, the jury does not automatically return a verdict of "Not Guilty." Rather, where a jury is unable to agree, a mistrial is declared. Cf. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) (jury unable to agree on verdict constitutes manifest necessity for mistrial).

Additionally, as the amicus concedes (Br. of Amicus at 9), the construction by the Court of Appeals constitutes a grammatically correct interpretation of

the language in Section II of the verdict sheet. "In addition to the clause referring to each mitigating circumstance marked 'yes,' the clause referring to each mitigating circumstance marked 'no' is also the object of 'we unanimously find that.' " Mills v. State, 310 Md. 33, 58, 527 A.2d 3, 15 (1987). Under these circumstances, there is no basis upon which to reexamine the Maryland court's construction of its own statute and rule.

II.

THE JURY INSTRUCTIONS IN PETITIONER'S CASE PROVIDED PROPER GUIDANCE FOR THE CONSIDERATION OF THE EVIDENCE PRESENTED IN MITIGATION.

Petitioner argues that, regardless of the constitutionality of the current interpretation of the statute announced in his case, he was denied the benefit of it. Specifically, he asserts that the instructions to the jury failed to convey "that mitigating circumstances not unanimously found could nevertheless be considered in the balancing process."

(Br. of Petitioner at 16). Petitioner's focus is misplaced. Because the instant instructions were not susceptible to any interpretation other than that unanimity was required to reject any mitigating circumstance, it cannot reasonably be inferred that any juror believed that a mitigating circumstance had been shown.[9]

In instructing the sentencing jury, the trial judge stated, in pertinent part:

> Let me remind you that in reaching your determination as to any of the issues raised by the case and presented to you on this sentencing form your verdict must be unanimous; that is, all twelve of you must agree. [(J.A. 69)]
>
> * * *
>
> Now should you find the existence unanimously and beyond a reasonable doubt of aggravating circumstance number

---

9 Petitioner took no exception to the instructions given (J.A. 74). As a result, review of the instructions in this case is limited to a determination of whether the instructions, taken as a whole, so infected the proceeding with unfairness as to constitute a denial of due process. See Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

> two and mark that yes, then you should proceed to section two, which begins at the top of page two. That provides that based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked yes has been proven to exist by a preponderance of the evidence, and each mitigating circumstance marked no has not been proven by a preponderance of the evidence. Again I stress that your finding as to mitigating circumstances must be unanimous, that is you must all agree. [(J.A. 70-71)]
>
> * * *
>
> Again let me stress the requirement of unanimity, that is your finding under section two and your findings under section three must be one in which all twelve of you agree. [(J.A. 73)]
>
> * * *
>
> Again let me remind you of the burdens of proof as I have defined them for you and the requirement that your verdict or your decision with regard to any of these items must be unanimous. [(J.A. 74)]

It is clear from the above that the jury was adequately informed that <u>any</u> determination in <u>any</u> of the sections on the verdict form had to be unanimous. There was nothing in the instructions to indicate that

unanimity was not required to reject a mitigating circumstance. With the understanding that unanimity was required for any finding, the jury marked "No" for each mitigating circumstance. Under the instructions given, the jury in Petitioner's case had to apply the interpretation of the statute articulated by the Court of Appeals, i.e., the need for unanimity to reject a mitigating circumstance.[10]

---

[10] Petitioner's reliance upon Andres v. United States, 333 U.S. 740 (1948), in support of his contention that the instructions here require reversal is misplaced. In Andres, death was the mandatory sentence for first degree murder unless qualified by the jury. In construing the federal statute in question, this Court held that qualification of the verdict was mandated unless the jury unanimously concluded that death was appropriate. Id. at 749. The jury had been instructed that "before you may return a qualified verdict of murder in the first degree without capital punishment, that your decision to do so must, like your regular verdict, be unanimous." Id. at 751. The Government conceded that if petitioner's interpretation of the statute was accepted (as it was), the instructions were inadequate. Here, the jury was not instructed that a mitigating circumstance should be affirmatively rejected if not unanimously found to exist. Rather, as outlined above, the jury was instructed that unanimity was required for all findings.

Petitioner ignores these instructions on unanimity and instead assumes that the instructions only required unanimity to find — and not to reject — a mitigating circumstance. Proceeding from this faulty premise, he assigns error of constitutional magnitude to the absence of instructions covering that part of the Maryland Court of Appeals' opinion where, in dicta, the court indicated that a jury that was not unanimous did not have to deadlock on a mitigating factor.[11] This aspect of the decision is, however,

---

[11] In Section VI.A. of the Mills opinion, the Maryland Court of Appeals rejected the contention that the Maryland death penalty statute as applied was unconstitutionally mandatory, relying on the deadlock provision discussed above. In Section VI.B. of the opinion, the Court proceeded to "comment generally upon the required jury determinations . . . in light of the traditional requirement of unanimity" for future guidance. Mills v. State, 310 Md. at 63, 527 A.2d at 17. In Section VI.B., the court indicated that, as an alternative to deadlock, the jury could pass over the mitigating circumstance, leaving both the "Yes" and "No" blanks empty, and any individual juror finding that the circumstance had been shown could weigh that circumstance in determining the appropriate penalty. Mills v. State, 310 Md. at 67-68, 527 A.2d at 19.

irrelevant to Petitioner's case, since the unanimous rejection of all mitigating circumstances under proper instructions on unanimity indicated there was no dissension within the jury that would make this provision applicable.[12] There is no indication anywhere that there was a lack of total agreement.

Moreover, application of this alternative to Petitioner's case would have benefitted the prosecution not Petitioner. As stated above, and as noted by the Maryland Court of Appeals, the impact of a lack of unanimity is a declaration, after a reasonable period of time, that the jury cannot agree and, under

---

[12] In support of his argument that a mark in the "No" blank likely reflects a non-unanimous vote, Petitioner ignores the instructions in this case and instead goes outside the record to focus upon the outcomes in two other sentencing proceedings held since the decision in this case where the jury's verdict sheet reflected division on some mitigating factors. No conclusion can be drawn from a proceeding where the jury deliberates with knowledge that unanimity is not required and, therefore, with no motivation to achieve agreement. Cf. Lowenfield v. Phelps, 56 U.S.L.W. 4071 (U.S. Jan. 13, 1988) (unanimity achieved after Allen charge given despite poll where jury indicated further deliberation would not be productive).

Article 27, §413(k)(2), the imposition of a life sentence. With respect to deadlock on the existence of a mitigating circumstance, a life sentence would be required no matter how little weight the mitigating circumstance in dispute may have carried. The procedure articulated by the Court of Appeals for these situations now permits the sentencer to move on to the weighing process despite an inability to agree over the existence of a mitigating circumstance.[13] Thus, under the court's articulation of the law a weighing process can occur, and a death sentence can result, in a situation that otherwise would have resulted in a hung jury. Even if this aspect of the decision was relevant

---

[13] The Court of Appeals determined that the capital punishment statute did not address the procedure to follow where there was a lack of unanimity on the existence of a mitigating factor. The court noted that it was empowered by the statute to fill procedural voids but that the Rule previously adopted did not address this situation. Mills, 310 Md. at 64-68, 527 A.2d at 18-20. Under these circumstances, the court examined the legislative intent and announced a procedure for this situation. This pronouncement has now been officially adopted as a new verdict form in Md.Rule 4-343.

to Petitioner's case, Petitioner was not denied the "benefit" of any "reconstruction."

In context, it is clear that Petitioner received the benefit of the Court of Appeals' articulation of the law in his case. Petitioner argued to the state court that the lack of unanimity on "Yes" would result in the marking of "No" on a mitigating factor, and "No" on all mitigating factors would result in a death sentence without undertaking a weighing process, even though some (and perhaps most) jurors believed mitigating circumstances were present. The Court of Appeals indicated that Petitioner's interpretation of the law was incorrect. "No" was not simply a place to mark for "Not Yes;" it was an ultimate finding that necessitated an unanimous rejection of the mitigating factor. A review of the jury instructions (to which no objection was lodged) indicates that the jury, in fact, was repeatedly advised that <u>any</u> finding had to be unanimous. As a result, the constitutional interpretation of the Maryland statute articulated by the Court of Appeals in Petitioner's case was applied to Petitioner.

III.

THE INTRODUCTION AT SENTENCING OF EVIDENCE DESCRIBING THE BACKGROUND OF THE MURDER VICTIM WAS CONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Despite the dissimilarities between the evidence about the victim in this case and that considered by this Court in <u>Booth v. Maryland</u>, 107 S.Ct. 2529 (1987), Petitioner contends that the introduction of "victim impact" evidence in his case violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. The State of Maryland continues to urge, as it did in <u>Booth</u>, that the introduction of evidence demonstrating the extent of the harm caused by a murder is a relevant circumstance of the crime to consider in a capital sentencing proceeding. Because the extent of the harm caused is a proper sentencing consideration,

"victim impact" evidence ought to be permitted. At a minimum, the prosecution should not be precluded from humanizing the victim with background evidence.

In this case, the sentencing jury was informed through a written interview summary introduced without objection that the victim, Paul Brown, and his brother came from a family of six, but at a young age, because of neglect, were removed from their parents' custody and placed in separate foster homes. Brown was a hyperactive child, who ran away constantly from the various homes in which he had been placed. At the age of 15, he started living on the streets and was eventually sent to the Maryland Training School for Boys. His brother opined that Paul "was a good person who had a tough life, a lot of bad breaks, no family, no home, nobody to really give him a chance. I sometimes think he felt more secure in prison, because he had no one on the outside. Sure he committed crimes, but he wasn't violent. He did what he had to do to

survive, and he got involved with a lot of bad people." (J.A. 85-86).

There was no evidence introduced in this case concerning the effect that Paul Brown's death may have had on his brother and sister-in-law. There was no mention of any other family or friends that may have been left behind. There was no evidence suggesting that the community at large suffered from the loss of one of its stalwart members. There was no evidence indicating that Paul Brown led a life to be valued over others. The evidence showed only one thing — that the victim in this case was not just a carcass, not just a nameless mass forced to endure the tortures imparted by Petitioner; he was a person.[14]

---

[14] The amicus asserts that this background evidence introduced at sentencing portrayed only the positive side of the victim and that Petitioner was precluded from introducing any evidence to contradict his portrayal in contravention of Gardner v. Florida, 430 U.S. 349 (1977). Gardner is inapposite. Petitioner's attempt to introduce the negative character evidence came at trial and was rejected as irrelevant. He never renewed his attempt to introduce this evidence at sentencing. As a result, no restriction is evident.

Above all else, the combined issues presented in this case demonstrate the imbalance existing between the prosecution and the defense in a capital punishment proceeding. On the one hand, under Lockett, Eddings, Skipper, and Hitchcock, there can be no limits on what a defendant can place before the jury to evoke emotion and to show the type of person that stands before the sentencer. Evidence concerning what happened to the defendant in childhood cannot be excluded (Eddings); evidence concerning the behavior of the defendant after the offense and after arrest, but before sentencing, cannot be excluded (Skipper). On the other hand, under Petitioner's interpretation of Booth, nothing can be introduced to humanize the victim.

In holding that victim impact evidence was "irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an

arbitrary and capricious manner," Booth v. Maryland, 107 S.Ct. at 2533, this Court focused upon the fact that the statement in that case centered upon the effect of the murder on the family, the articulateness of the family members, and the standing of the victim in the community. Id. at 2534. No comparable evidence was presented here.

The evidence was presented in the form of a summary prepared by a probation agent. Questions regarding how the victim's family was affected or how well they could articulate were never generated. The evidence merely described an individual, one who had been in trouble all his life and who, at the time of his murder, was serving time in prison.

Evidence about the victim demonstrating the extent of the harm caused can be introduced in a manner so limited as to minimize the possibility of a sentence predicated on passion. Permitting such evidence would enable the sentencer to see the victim as a real person, without generating concern that a

particular sentence is based upon considerations totally irrelevant to the sentencing process. This case presents a perfect example of such evidence about the victim.

Although this Court in Booth included, within the scope of "victim impact" evidence, reference to the character of the victim, 107 S.Ct. at 2533, this Court also indicated that "similar types of information may well be admissible because they relate directly to the circumstances of the crime." 107 S.Ct. at 2534, n.10. Utilizing this distinction, evidence concerning a victim's affluent lifestyle and plans for the future has been held admissible at sentencing because it may have helped explain her whereabouts on the night of the murder. State v. Bell, 360 S.E.2d 706, 712 (S.C. 1987). There is no principled way to draw such a fine distinction. Rather, objective evidence of character

to humanize the victim of the crime ought be permitted in any case.[15]

As articulated by Justices White and Scalia in their dissents in Booth, the determination of an appropriate penalty is dictated not only by the "moral guilt" of the perpetrator, but also by the extent of the harm he caused. 107 S.Ct. at 2539 & 2541. Despite the fact that the penalty of death is unique from all others, the extent of the harm caused is an appropriate consideration in a capital punishment proceeding — especially where the "harm" is limited to knowing that

---

[15] In Maryland, the holding of Booth has been asserted in support of claims of error in contexts well beyond formal victim impact statements. In State v. Colvin, Sept. Term, 1986, No. 88, currently pending before the Maryland Court of Appeals, Booth error was claimed in the prosecutor's description of the victim in opening argument. In Hunt v. State, Sept. Term, 1987, No. 53, also pending, Booth error was said to have been generated when the victim's family shed tears at trial when a tape recording of the victim's voice was played. The defense in Hunt, relying on Booth, even sought to exclude the victim's wife from the courtroom.

the victim was an individual with an identity and his own personal characteristics.[16]

---

[16] Mills specifically stated that he had no objection to the introduction of the victim impact evidence in this case (J.A. 14-15). Nor was any issue concerning the admissibility of victim impact evidence raised by Mills on his automatic direct appeal. However, the issue was addressed by the Maryland Court of Appeals in view of the temporal proximity between this Court's opinion in Booth and the Mills decision. Because the Maryland court found that the evidence in this case did not constitute a victim impact statement such as that proscribed in Booth, the court did not assess the possibility that any error in the introduction of this evidence was harmless, although the court did note that "the content of this statement would not inflame a jury or otherwise prejudice Mills." 310 Md. at 72-73 n. 14, 527 A.2d at 22 n.14.

Even if the introduction of this evidence was error, it is harmless, not only because of the objective nature of the statement itself, but also because of the absence of any weighing process in this case. As was implicitly recognized in Booth, a victim impact statement is irrelevant to the presence or absence of any aggravating or mitigating circumstance. Rather, victim impact evidence was asserted to be a circumstance of the crime that would constitute the flesh on the skeleton on the aggravating side of the scale, together with considerations such as the heinousness or atrocity of the crime, for purposes of weighing. Here, however, there was no weighing. Petitioner was sentenced to death because the jury found no mitigating factor. Inasmuch as the existence of victim impact evidence had no relationship to that conclusion, its admission does not necessitate the (Continued)

CONCLUSION

The Maryland capital punishment statute is not mandatory in any respect. It permits full consideration of any evidence offered by the defense in mitigation of sentence. If the jury unanimously concludes that the evidence presents no circumstance of mitigation, the death sentence is to be imposed without a weighing process. This is logical inasmuch as there is nothing on the side of mitigation to weigh. Given the absence of any limitation on the defendant's right to produce evidence, and the absence of any limitation on the jury's right to find mitigation, the procedure is constitutional.

The constitutional Maryland capital punishment scheme was properly applied in Petitioner's case. The jury was instructed in conformance with the law as articulated by the Maryland Court of Appeals in Petitioner's case. No "new" principle of law which could inure to Petitioner's benefit was denied him. No

---

setting aside of the death sentence.

"limiting" revision of law to render the ultimate decision constitutional was applied to his case. No improper evidence was introduced to render his death sentence suspect.

For these reasons, the State of Maryland respectfully requests that the judgment of the court below be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.,
Attorney General of Maryland

CHARLES O. MONK, II,
Deputy Attorney General

GARY E. BAIR,
Assistant Attorney General

RICHARD B. ROSENBLATT,*
Assistant Attorney General

The Munsey Building
7 North Calvert Street
Baltimore, Maryland 21202
(301) 576-6410

Counsel for Respondent

* Counsel of Record